

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)

Amendment of the Commission's Rules)
Regarding Installment Payment Financing for)
Personal Communications Services (PCS))
Licenses)

WT Docket No. 97-82

To: The Commission

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**OPPOSITION OF THE
PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION,
PCS DevCO, ZUMA PCS, L.L.C., CLEAR TALK,
POLYCELL COMMUNICATIONS, INC.,
CFW COMMUNICATIONS COMPANY,
AND INDEPENDENT CELLULAR CONSULTANTS PCS**

The Personal Communications Industry Association ("PCIA"),¹ joined by several impacted C and F block license holders, hereby submits these Comments in opposition to the Joint Petition of U S WEST Wireless, LLC and Sprint Spectrum L.P. d/b/a Sprint Spectrum (collectively, "Joint Petitioners") for reconsideration of the *Order on Reconsideration of the Fourth Report and Order*.²

¹ PCIA is an international trade association established to represent the interests of the commercial and private mobile radio service communications industries and the fixed broadband wireless industry. PCIA's Federation of Councils includes: the Paging and Messaging Alliance, the PCS Alliance, the Site Owners and Managers Association, the Private Systems Users Alliance, the Mobile Wireless Communications Alliance, and the Wireless Broadband Alliance.

² *In re Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Service (PCS) Licenses*, WT Docket No. 97082, *Order on Reconsideration of the Fourth Report and Order*, FCC 00-54 (rel. Feb. 29, 2000) ("Order on Reconsideration of the Fourth Report and Order").

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PCIA fundamentally opposes the Joint Petitioners' suggestion that the Commission can modify eligibility rules for the C and F block PCS licenses and modify the PSC band plan without a rulemaking proceeding in accordance with Part 1, Subpart C, of the Commission's rules.³ These rules were adopted more than 5 years ago in the FCC's Fifth Report and Order in this proceeding, with the statutory reconsideration deadline long since expired. At a minimum, the Commission must adopt a Further Notice of Proposed Rulemaking to modify these rules in any way. This Notice would inform the public of a majority of the Commissioners' concerns with the current rules and provide a tentative justification for the change of direction in implementing Sections 309(j)(3) and (4) of the Communications Act of 1934, as amended.

**THE PROCESS ENVISIONED BY THE JOINT PETITIONERS
AND THE FCC VIOLATES THE FUNDAMENTAL DUE PROCESS RIGHTS
OF DESIGNATED ENTITIES AND OTHER ENTREPRENEURS**

PCIA recognizes the desire of the FCC and Joint Petitioners to have certainty surrounding the rules governing Auction No. 35, and any subsequent auctions for C and F block PCS spectrum. PCIA's members, other Designated Entities ("DEs") and entrepreneurs seeking to bid upon PCS licenses also require a degree of certainty as to their rights and obligations well before their participation in this auction, so as to assure their appropriate auction strategy. However, the shortcut approach that the Joint Petitioners request, and the FCC appears to be endorsing, does not adhere to the public notice and comment requirements required by law, and will not create the record necessary for a thorough and reasoned decision by the FCC. Nor does this process provide the public with the Commissioners' justification for a change in course at this late date and permit a response to these concerns. Rather, these truncated procedures will

³ See 47 C.F.R. §§ 1.399 *et seq.* (following generally the informal rulemaking provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*).

ultimately cause procedural delays (regulatory and judicial) by creating avenues of appeal that would not otherwise lie in the absence of this apparent rush to judgment.

The elimination of proper rulemaking procedures,⁴ the inadequacy of Federal Register publication of its intent to dispose of appropriate rulemaking procedures,⁵ the truncated time in which the public may reply to petitions for reconsideration, the inappropriateness of consolidating comments responding to petitions for waiver and further request for rulemakings into the reconsideration phase – all violate the Commission’s fundamental obligation to comply with the Administrative Procedures Act (“APA”) and its own rules.⁶ The Commission and the industry simply must abide by these means of proposing and changing rules absent the most extraordinary circumstances.

⁴ PCIA is also very concerned by the Joint Petitioners’ suggestion that the Commission dispense with the 30-day, post-decision publication requirement that would allow the public to become aware of all rules 30 days prior to their effective date. *See Joint Petition*, at 10 n.24. The Commission should not ignore this fundamental duty to alert the public of new obligations except in the most dire of circumstances. Certainly, the Commission’s internal desire to hold an auction on a certain date does not qualify as such a circumstance when the date of the C and F block auction is entirely under its control. Moreover, limiting public notice of auction rules would undermine an entrepreneur’s preparation for an auction held under these changed circumstances.

⁵ PCIA notes that the Federal Register publication, 65 Fed. Reg. 18333 (April 7, 2000), is an inadequate notification of the proposed changes to the Commission’s rules given the wide breadth and depth of the proposal. The summary of the Joint Petition is devoid of any terms or substance of the proposed rules; it does not even contain a meaningful description of the subjects or issues involved. This is particularly troubling here where the Commission has departed from standard “reconsideration” practice and is attempting to substitute this petition for a Commission-drafted Notice of Proposed Rulemaking.

⁶ *See id.*; see also *In re Federal-State Joint Board on Universal Service, Memorandum Opinion and Order and Seventeenth Order on Reconsideration*, CC Docket No. 96-45, FCC 99-280, ¶ 17 (rel. Oct. 13, 1999) (denying a petition for reconsideration in a rulemaking proceeding because it was untimely); *In re Implementation of the Telecommunications Act of 1996: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Second Order on Reconsideration of the Second Report and Order in CC Docket No. 96-98*, FCC 99-227, ¶ 132 n.318 (rel. Sep. 9, 1999) (denying an SBC petition for reconsideration because it was filed one day after the 30-day filing period required by Section 405(a) of the Communications Act and Section 1.429(d) of the Commission’s rules, and further denying SBC’s motion to waive this rule, stating that “the Commission lacks discretion to waive this statutory requirement” (citing

Although the above list of procedural infirmities is not intended to be exhaustive, nor fully briefed in light of the strictures of time permitted by the Commission, PCIA notes that the absence of proper notice and comment will deprive the Commission of information critical to the decision making process with respect to DE participation. Just as importantly, absence of a Notice deprives the public of at least a majority of the Commissioners' current thinking as to why the rules should be changed.

For example, the Commission has previously held that, in the absence of a set aside, DEs would not be able to have any opportunity to succeed in the C and F block auctions in the absence of at least a 50% bidding credit.⁷ The current bidding credits, crafted in the context of a set aside for DEs, is in the range of 15 to 25%, depending on the qualifications of the licensee. These amounts obviously fall far short of the amounts the FCC concluded necessary, if no set asides are to exist. Yet, the record is devoid of the amount of bidding credits that would be required to assure real DE opportunity in the absence of a set aside. The record is devoid of this information because the Commission has not yet solicited comment on this issue, as PCIA expected it would do if it intended to eliminate the set-asides.⁸ This it must do prior to

Virgin Island Telephone Corp. v. FCC, 989 F2d 1231, 1237 (D.C. Cir. 1993) and *Reuters Ltd. v. FCC*, 781 F2d 946, 951-52 (D.C. Cir. 1986)).

⁷ The Commission has recognized the overwhelming evidence in the record to the effect that bidding credits, even in the order of fifty percent (50%) or more would be ineffective in achieving entrepreneur success in the auctions. See *ex parte* filings of American Wireless Communications Corp., May 26, 1994 at 2, and Columbia PCS, June 2, 1994 at 2, cited by the Commission in *In re Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Report and Order*, 9 FCC Rcd 5532, 5590, n.109 (1994).

⁸ The Commission did seek comment and conduct a proper inquiry in its initial rulemaking regarding DE bidding and licensing rules. See *In re Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Report and Order*, 9 FCC Rcd 5532 (1994), *Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403 (1994). However, this proceeding is several years old and any request for Commission reconsideration is clearly outside of the 30-day reconsideration window required by Section 405(a) of the Communications Act. See 47 U.S.C. § 405(a); 47 C.F.R. §

modifying or eliminating the current eligibility requirements to participate in the C and F block auctions, the eligibility to hold such a license, or the division of PCS spectrum.⁹

Moreover, the Petition for Reconsideration filed by the Joint Petitioners is procedurally infirm, and the Commission cannot cure that infirmity by consolidating into the underlying docket the comments filed in response to prior petitions for waiver.¹⁰ The Petition of Reconsideration filed by Joint Petitioners is not a petition responding to the *Order on Reconsideration of the Fourth Report and Order* (or issues raised in the *Fourth Report and Order* itself), but rather seeks to have the Commission reconsider rules which have been final and beyond Commission review for years (notwithstanding the introduction of new rulemaking proceedings using the same docket number).

The time to file for reconsideration of the way PCS spectrum was allocated and licensing qualifications adopted was in response to the Order creating the spectrum blocks, not years later after that Order is final. Likewise, the time to file for reconsideration of the eligibility requirements was within the time period following adoption of the Order in which band plans and eligibility were established, not years after. The Joint Petitioners and the Commission certainly cannot use the *Order on Reconsideration of the Fourth Report and Order* as a vehicle

1.429(d). As such, a new rulemaking proceeding is required to alter the final rule provisions in question.

⁹ These decisions are reflected in Part 24, subparts E and H, of the FCC's rules.

¹⁰ See *supra* note 6; see also *In re Motions for Declaratory Rulings Regarding Commission Rules and Policies for Frequency Coordination in the Private Land Mobile Radio Service*, Memorandum Opinion and Order, FCC 99-160, ¶ 11 (rel. July 7, 1999) (denying an application for review in what appears to be a "daisy chain" of denied procedural requests (including petitions for reconsideration, motions for extension and motions for declaratory rulings) attempting to revise Commission rules made final by legitimate rulemaking procedures thirteen years prior).

for reconsideration of rules when the Fourth Report and Order addressed none of the matters raised by the Joint Petitioners.

While PCIA believes that the rules adopted by the Commission in 1994 are necessary to provide PCS entrepreneurs with an opportunity to hold these licenses in accordance with Congressional direction,¹¹ there may be other means of complying with Section 309 that could be accomplished in the context of a full rulemaking. Assuming that a new rulemaking is initiated with adequate time for public comment and the creation of a complete record, PCIA is prepared to respond to the specific concerns that a majority of Commissioners set forth and the opinions raised by all interested parties.¹²

Unfortunately, however, PCIA and other interested parties cannot respond to Commission concerns – as yet not specified – through a series of fast track waiver and reconsideration filings. The construction of the necessary evidentiary record requires time—the time normally allowed for parties to comment in legitimate rulemaking proceedings. This rulemaking need not be lengthy, but given the fact that Auction 35 licenses have been non-operational for several years, it is disingenuous to suggest that the FCC should ignore proper procedures in order to shave six to eight weeks of auction delay.

Plain and simple, if the FCC issues a rulemaking proposal to change the PCS rules, it should address in such a proceeding all of the other rules which require modification, amendment or elimination in order to assure full participation by DEs or explain why it intends to limit DE participation for the remaining C and F licenses. In the absence of such a thorough

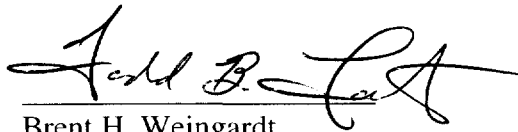
¹¹ See, e.g., 47 U.S.C. §§ 309(j)(3)(B), 309(j)(4) and 309(j)(7).

¹² PCIA notes that changes to these rules are of particular interest to entrepreneurs who do not yet hold PCS licenses and intend to bid in Auction 35. These individuals have yet to receive adequate notice of this impending rule change.

and procedurally correct overhaul, PCIA cannot conceive how the Commission can satisfy its Section 309(j) obligations to designated entities.

WHEREFORE, for the foregoing reasons, the Commission should dismiss or deny the Joint Petition.

Respectfully submitted,



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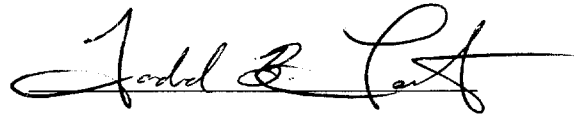
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April 17, 2000

CERTIFICATE OF SERVICE

I, Todd Lantor, hereby certify that on this 17th day of April, 2000, I caused a true and correct copy of the foregoing **"Opposition to Joint Petition for Reconsideration by the Personal Communications Industry Association"** to be served, via first-class mail, postage prepaid, upon the following:



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